
Restriction and Incentives of Investment in Indonesia: Considering the Provisions of Basic Agrarian Law and Capital Market Law

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Abstract:

Investment plays an important role in improving the economy, so investment is needed by every country. On the other hand the goal of investors in any investment is to gain profit, so investors expect assurance of investment security. Such security guarantees can be achieved by providing legal assurance of investment, and therefore adequate regulation is required.

This study aims to briefly describe the notion of investment in its legal perspective. The study mainly discusses the Indonesian government arrangement in investment, by considering the provisions of two important laws in investment, that are Basic Agrarian Law and Capital Market Law.

The results show that Indonesia as a developing country has already established some regulations about investment, especially direct investment, among others in the form of Basic Agrarian Law and Capital Market Law.

In the Basic Agrarian Law the granting of land rights has been arranged for investors who are legal entities and individuals, while in the Capital Market Law the incentives and the facilities obtained by investors in the form of direct incentives / facilities are regulated.

Keywords: *Investment, basic agrarian law, capital market law, incentives, restrictions.*

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1. Introduction

Any investment made by the investor aims to gain profit in the shortest possible time. Therefore every investor wants easy, quick, cheap investment regulations and ensures the security of the investments it undertakes. Investment has a very important role to increase the economic growth of the individual (investor itself) and the community economy, which in turn will also affect the country's economic growth. Each individual economic growth will support the economic growth of the community, and every economic growth will support the country's economic growth. Therefore, it is only natural that a country competes to attract investors to invest in their country. Profits derived from an investment should not only be for the investor alone, but also can provide benefits for the community and the state. Since an investment can provide benefits to investors, communities and countries, then the existence of such investments will be maintained by investors, communities and countries.

Direct investments can be made by both domestic and foreign investors, but many countries including Indonesia still require foreign investors, since the presence of investors leads to a wide range of benefits (multiplier effects). Benefits that can be provided by the presence of foreign investors, such as supply of labor in the recipient country, demand for domestic products as raw materials, increase in foreign exchange, export-oriented firms can supplement state income from the tax revenues and the transfer of technology and transfer of know how in the local market (Sembiring, 2007). This study aims to briefly describe the notion of investment, and its legal perspective. This discussion is then followed by the Indonesian government arrangement in investment, by considering the provisions of two important laws in investment, that are Basic Agrarian Law and Capital Market Law.

2. Investment and its Economic Impact

There are several definitions of investment. According to P.M. Jhonson, as quoted by Rachbini (2008), investment is all the income spent by companies or government agencies for capital goods to be used in productive activities. Rachbini quoted Reilly and Brown stating that investment is a commitment to tie up current assets for some period of time to the future in order to earn income that can compensate for investor sacrifices in the form of: (1) attachment of assets at a certain time, (2) inflation rate, and (3) uncertain future income (Rachbini, 2008).

Departing from the opinion of Reilly and Brown, it is obvious that the main purpose of an investment is to earn income. In other words the motive of an investment is income. The intended income is certainly the profit to be gained in an investment based on business calculations. So it is not excessive to say that the purpose of an investment is to gain profit. The General Dictionary of Indonesian (Poerwadarminta, 2006) mentioned that investment means the investment of money or capital in the company. According to Economic Dictionary, investment has two meanings. First,

investment means the purchase of stocks, bonds and immovable objects, if the analysis will ensure the capital is laid and gives satisfactory results. These factors distinguish investments from speculation. Second, the theory of investment economy means the purchase of means of production (including items for sale) with capital in the form of money (Winardi, 1982). According to the Dictionary of Financial and Investment Terms, investment is defined as the use of capital to create money, either through revenue-generating means or through a more risk-oriented venture designed to gain capital. Investment can also mean pointing to a financial investment (where the investor places money into a facility) or pointing to an investment of a business or the time someone wants to benefit from the success of his work (Downes and Goodman, 1994).

According to the Encyclopedia Economic Trade Finance, investment is the use of economic resources for the production of producer goods or consumer goods. In a purely financial sense, investment means to place capital funds within an enterprise over a relatively long period of time in order to obtain an orderly yield with maximum security (Aburrachman, 1991). The Dictionary of Economic Law states that investment is usually done for the long term, for example, in the form of procurement of fixed assets or buy securities with the intention to gain profit (Erawaty and Badudu, 1996).

Kamaruddin (1996) refers to investments as placing money or funds in the hope of obtaining additional or specific gains on the money or funds. In this definition, investment is focused on the placement of money or funds. The goal is to make a profit. This is closely related to investment in the capital market. According to Article 1 number 1 of Law Number 25 Year 2007, investment is any form of investment activity, either by domestic investor or foreign investor to do business in the territory of the Republic of Indonesia.

Based on the above definitions, especially the juridical definitions as contained in Article 1 point 1 of the Capital Market Law, it can be determined that more investment is required by investors by way of conducting or establishing new business. Such investment is called direct investment (Pandji, 1994). Investment can be done by individuals or business entities or companies, whether companies established by Indonesian citizens or by foreign nationals. Similarly, companies that make investments are national companies or multi-national companies investing in Indonesia.

Every investor, both individuals and corporations, whether national or multilevel scaled in the business sector, have the main objective of obtaining profit, not to help the recipient country. This is revealed in the opinion expressed by Dar and Dar (1970) that *“the foreign investor is not motivated by consideration of extending aid for development, but is solely commercial, and expects returns from his investment.”*

It is this investor's goal that makes the recipient country (recipient of capital) to be very careful to accept the investor freely and openly, as investors if allowed to enter a country without restrictions will be able to undermine the existing order of the country. On the other hand, every country, especially a developing country, must require foreign investors to build the economy of the country. In other words, the presence of foreign investors in a recipient country, has a positive and negative impact.

The impact of such foreign investments makes the recipient country in a dilemmatic position, as disclosed by Hadiwinata (2002) that there are a number of economic experts who link direct expansion to developing countries with the positive impacts of MNCs' activity that encourage developing country governments to open up more to foreign investment. They generally agree that developing countries want foreign investment because of the immediate benefits that can be felt from the presence of MNCs. The positive impact of the presence of MNCs is the first to contribute to the economic growth of a country; both create new jobs and the third capital brought by the MNCs can improve the balance of payments of developing countries.

Although the presence of foreign investors has a negative impact, but the positive impact of economic improvement is more promising for the progress of a country, therefore every country tries to attract investors as much as possible, especially foreign investors, to make direct investment in the country. The importance of direct investment for the development of a country can be seen from the opinion of Gunarto Suhardi (2004), that direct investment is better when compared to portfolio investment, because direct investment is more permanent. In addition, direct investment aims to provide employment opportunities for residents, have a doubling power in the local economy, provide good risks in the form of equipment and technology transfer, when production is exported it provides roads or marketing channels that can be traced by local entrepreneurs in addition to instantly providing additional foreign exchange and taxes to the state, more resistant to fluctuations in interest and foreign exchange, provide political protection and territorial security because if an investor comes from a strong country undoubtedly a security assistance will also be provided.

In view of that opinion, the advantages of a direct investment are for the recipient countries only, but it is not as true as it is. Investors who will make investments certainly do not do so arbitrarily, but will first conduct research through feasibility study in the country to be addressed. Feasibility studies that may be assessed, among others, from the legal aspects, as well as sociopolitical, as well as the security and market conditions. The purpose of conducting the feasibility study is to give an idea to potential investors whether it is feasible to invest in the country or not. Of all the aspects mentioned above, which will be discussed here is the legal aspect for investors

The legal aspect desired by the investor is the security for his investment, namely that all investments he undertakes will be protected by the state through good and adequate laws. This is very important for investors, because with good and

adequate regulation, it will give confidence to investors that the investment will be guaranteed security (guarantee of legal certainty) and the purpose in investing in the form of profit will be achieved well. Associated with the wishes of these investors, so many countries are competing to make regulations about investment, especially about direct investment, in order to attract investors to invest in their country, not least with Indonesia. Proven Indonesia has made regulations about direct investment for investors since 1960.

3. DIRECT INVESTMENT IN INDONESIA

As has been described above, that direct investment is an investment that requires the presence of investors by way of establishing a company. Establishing a company means investors need land for it, both for industries (factories, offices, etc.) as well as for plantation business and other businesses. Therefore a regulation of land rights in Indonesia should be established. Indonesia has made a regulation in the field of direct investment since 1960 with the enactment of Law Number 5 Year 1960 on Basic Agrarian Law Principles (hereinafter referred to as BAL). One of the objectives of the establishment of BAL is to provide legal certainty to the holders of land rights. This can be seen from the General Explanation the figure IV of the first and second paragraphs of the BAL, that enterprises that lead to the certainty of the right to land is in fact from the provisions of the articles regulating land registration.

Articles 23, 32 and 38 are addressed to the rights holders concerned, with the intent that they be assured of their rights. While Article 19 is addressed to the government as an instruction, so that all areas of Indonesia held registration of land that is rechts-cadastre, meaning that aims to ensure legal certainty. Legal certainty comes from the rule of law, and in order for legal certainty to be achieved, the law must be able to function as a rule that must be obeyed. It was expressed by Gustaf Radbruch as quoted by Theo Huijbers (2007), that:

“.. in the legal sense it is possible to distinguish the three aspects which are all three required to arrive at an adequate legal sense. The first aspect is justice in a narrow sense. This justice means equal rights for everyone before the court. The second aspect is the goal of justice or finality. This aspect determines the contents of the law, because the content of the law is in accordance with the objectives to be achieved. The third aspect is legal certainty or legality. This aspect ensures that the law can serve as a rule to be obeyed.”

According to Sudikno Mertokusumo (1999), legal certainty is a fair protection against arbitrary acts, which means that a person will be able to obtain something to be expected under certain circumstances. Considering the opinion of Gustaf Radbruch and Sidigno Mertokusumo, it can be seen that in order to have legal certainty, then the law must be able to function as a regulation that must be obeyed, so that someone will be able to obtain something expected in certain circumstances. This means that with the functioning of the law as a regulation that must be adhered to, then investors who have invested will benefit as expected.

From that understanding, Indonesia has made legislation on land rights for investors. The need for land rights is determined in the legislation in order for investors to make an investment can get something that is expected in accordance with the provisions regulated in the legislation. Investor of a legal entity including a

foreign legal entity or a multinational corporations investing in Indonesia, whether engaged in agriculture, livestock or animal husbandry may have a right for business to land and investors engaged in the industry (factory) and the like can have rights to land in the form of building rights. In addition, foreigners and foreign legal entities can also have rights to land in the form of right to use and rental rights to buildings.

4. RESTRICTIONS FOR INVESTORS

Therefore, the next term investment and investment will be used alternately in accordance with the context of which term is considered the most appropriate use in a single sentence (Puspadma, 2013). Some restrictions and incentives / facilities for investors who invest in Indonesia, both domestic investment and foreign investment are regulated in the Capital Market Law. The restrictions in question are in the field of business that can and the field of business that can not be done by the Investor. This restriction applies in order to control and supervise investment activities in Indonesia,² while incentives / facilities are given to investors to encourage them to invest in Indonesia.

The restrictions in investment by the Government of Indonesia is conducted by arranging closed and open business fields in the field of investment. The limitation of activities for investors is regulated in Article 12 of Capital Market Law. The main principle of Law is to open the widest field of business for investment activities. The purpose of this policy is to facilitate investment activities in Indonesia as described in Article 12 paragraph (1) of Capital Market Law states that business fields or closed and open business types with conditions stipulated through a Presidential Regulation shall be prepared in a list based on classification standards concerning business or business type applicable in Indonesia, which is classification based on the Classification of Indonesian Business Class (KBLI) and / or International Standard for Industrial Classification (ISIC).

The final determination of the closed and open business field is contained in Presidential Regulation No. 44 of 2016 concerning the List of Closed Business Fields and Opened Business Fields with Requirements in the Field of Investment, set out on May 12, 2016 and enacted at Dated May 18, 2016, (Presidential Regulation No. 44 of 2016). In the Presidential Regulation, three business fields in the investment activities contained in Article 2 paragraph (1) are as follows: a. Open business field; b. Closed business fields; And c. Open business field with terms. Paragraph (2) of the same article regulates the open field of business with conditions consisting of: a. Open business fields with requirements: those reserved or partnerships with Micro, Small and Medium Enterprises and Cooperatives; and b. Open business fields with certain requirements, namely: 1) restrictions on foreign capital ownership; 2) specific locations; 3) special permits; 4) domestic capital 100% (one hundred percent); And / or 5) restrictions on capital ownership within the framework of the Association of Southeast Asian Nations (ASEAN) cooperation. While Article 3 of Presidential Regulation no. 44 of 2016 determines that fields of

² Ermanto Fahamsyah, 2015, *Hukum Penanaman Modal (Pengaturan, Pembatasan, Pengaruh Budaya Hukum dan Praktik Penanaman Modal di Indonesia)*, Yogyakarta: LeksBang PRESSindo, hlm. 48.

business that are not listed in the Closed Business Field and Open Business Fields with Requirements are Open Business Fields.

Concerning closed business field and opened business field with requirement can be read more clearly in Attachment of Presidential Decree no. 44 of 2016, which consists of: Annex I, Annex II and Annex III, which is attached to this article. In addition to the ease of investing in Indonesia on land which has been regulated in the Law and Regulation 40 Year 1996 as described above which is also one of the provision of direct incentives to investors, arranged also the provision of ease / convenience / other facilities for investors.

5. INCENTIVES AND FACILITIES FOR INVESTORS

Incentives / facilities for investors given by the Indonesian government are regulated in the Capital Market Law, which consists of: direct incentives and indirect incentives.

a. Direct incentives

Direct incentives consist of a) ownership of capital; b) asset transfer, transfer and repatriation; c) employment; d) taxation; e) immigration and residence permits; and f) import licensing facility.

a. Capital ownership for foreign investors

Investment activities in Indonesia consist of domestic investment and foreign investment. In this paper only investment / foreign investment only will be described. The meaning of foreign investment according to Article 1 Sub-Article 3 of Capital Market Law, state that Foreign investment is an activity of investing to conduct business in the territory of the Republic of Indonesia conducted by foreign investors, whether using foreign capital completely or in connection with domestic investors. Under this provision, the Capital Market Law provides the possibility for foreign investors who have 100% capital in one company. Arrangements that allow foreign investors to own 100% of shares in a company are intended to provide incentives or allowances for foreign investors, so that foreign capital investment can be free to invest without being accompanied by the domestic investor. However, the arrangement can not be considered final, because it still has to meet some other requirements such as: its business field, the nature of its business, its form of business, the composition of share ownership, and divestiture.

b. Transfer of assets, transfers, and repatriation

The facilities provided for the transfer of assets, transfers and repatriation aims to further encourage investors to invest their capital into Indonesia, but everything must be done in accordance with the provisions of legislation and do not cause losses to the state.

c. Employment

One of the reasons the Indonesian government brings in foreign investors especially those engaged in direct investment is to open employment opportunities. Therefore, between direct investment and employment are closely related, ie there is a reciprocal relationship. Investors on the one hand provide the implications of employment creation that can absorb labor, on the other hand the available human resource conditions and the surrounding employment

situation will have a major impact on the possibility of an increase or decrease in investment. Investors who have invested in Indonesia are required to use Indonesian citizens, but on the other hand are also given the right to use foreign workers, as long as the skills required are not owned by Indonesians. Such incentives are provided by the Indonesian government for foreign investors investing in Indonesia, which is entitled to use foreign workers.

d. Taxation

Incentives in the field of taxation granted by the Government of Indonesia to investors shall be stipulated in Article 18 of the Capital Market Law. Article 18 regulates the Government shall provide facilities to investors investing capital, including in doing business expansion; or making new investments. With the provisions of this article, the Indonesian government grants exemption or deduction of corporate income taxes in a certain amount and time, which may only be granted to new investments which constitute a pioneer industry, ie industries with broad interconnection, high added value and externality, Introducing new technology so that technology transfer can occur, and has strategic value for Indonesia's national economy. For investments that have been and are in progress that make the change of machine or other capital goods, can be given facilities in the form of waivers or exemption of import duty. Tax facilities regulated in Capital Market Law are not only directed to investors who have invested their capital, but also to new investors. That is, any capital trader either whose business is already and is running, or who just start running business, can be given tax facilities as stipulated in the Capital Market Law.

e. Immigration and residence permits

Immigration problems are often perceived by foreign investors as an obstacle, where they are often pursued by immigration officers on residential administrative affairs if they have reached six months of their stay in Indonesia. In order not to happen things that are concerned by investors especially about it, as set in Article 23 of Capital Market Law. The ease in the field of immigration is given to foreign investors who have invested capital, as well as to the new will invest their capital, even this convenience is also given to potential investors who are planning to invest their capital that requires coming to Indonesia to conduct research by conducting a feasibility study .The feasibility study conducted by the prospective investors may take a long time, so for that purpose Indonesia provides opportunities for potential investors to stay longer. Fulfillment of longer residence time in Indonesia, by the Indonesian government is done by providing limited residence permits, even for prospective investors who have to come many times as well as to facilitate the extension of entry permit to Indonesia.

f. Import licensing facility

Import licensing facilities are granted by the Government of Indonesia to investors including foreign investors investing in Indonesia in the form of ease of service and / or licensing of import licensing facilities as regulated in Article 24 of Capital Market Law. The import licensing facility is devoted to

goods that are not harmful to the Indonesian people, both in terms of safety, security, health, and morals and not damage the environment of the Indonesian state. As long as the goods are needed to support the production of an investor company even the goods are goods transferred from an existing investor company abroad and if imported into Indonesia does not give negative impact, then this facility must be given.

b. Indirect incentives

Indirect incentives consist of the provisions of the article regulating the Guarantee Against Nationalization Act; and the Settlement of Investment Disputes provide protection to foreign investors, that the company founded in Indonesia will not be nationalized or taken over by the Indonesian government. If it is because of something and other things must be done, then to investors will be given compensation based on market price, if investors do not agree, it will be resolved through the arbitration institution.

This provision clearly gives investors a high right. The Indonesian government will not take arbitrary action to investors for legal certainty. Because legal certainty in this case means providing protection to investors so that in certain circumstances the investor gets something as expected. With the nationalization or takeover of the company, investors do not get the results as expected, but given the compensation in accordance with market prices, then the expectation is little that can be met. Even the amount of the compensation provided previously must be approved by the investor, if the investor does not agree with the amount of compensation, then can be submitted to the arbitration institution.

Incentives given by the Government of Indonesia includes settlement of investment disputes to investors to resolve disputes arising on investments that have been done, are regulated in Article 32 of Capital Market Law. Any relationship between one individual with another individual or between individuals with a group of people or otherwise, may arise dispute between them. This dispute arose because of differences of opinion among the individuals. The possibility of such a dispute may also occur between the individual and the government including with the Indonesian government. Realizing the possibility of such a dispute, the Capital Market Law regulates the settlement of a possible dispute, and the dispute settlement is preceded by deliberation for consensus, in case of unexpected consensus then is settled by arbitration or court.

CONCLUSION

Indonesia as a developing country that is being actively build has already regulation about investment, especially direct investment among others in the form of Basic Agrarian Law and Capital Market Law. In the Basic Agrarian Law the granting of land rights has been arranged for investors who are legal entities and individuals, and in the Capital Market Law regulated about incentives / facilities obtained by investors in the form of direct incentives / facilities, among others in the form of tax exemption / reduction and incentives / indirect facilities. The guarantee will not be nationalized. Besides, it is also easy to manage permits by creating one-stop integrated service policy. The Indonesian government is very aware of the needs of investors, both domestic investors and foreign investors, so for all the needs

of investment security is protected by making adequate regulation. Not only the Indonesian government knows, it even seems to spoil investors by making regulations that provide facilities very much to the investors. The facilities provided are not only in the form of regulation to obtain legal certainty guaranteed, even given the freedom or reduction or delay of tax and will not hold nationalization, if any then the investor concerned is given compensation agreed between the government and investor.

The Indonesian government needs to continue to make policies in favor of investors without ignoring the interests of the people and the state. The investors are expected to immediately make direct investment in Indonesia, because the Indonesian government is very concerned about the interests of investors. The people of Indonesia, always maintain security and order, because with the creation of security and order, more investors will invest, so as to create additional employment and the community can work to earn income. Therefore, investors no longer need to hesitate to invest in Indonesia because Indonesia has a regulation that ensures legal certainty that provides security guarantees for investors and even the existing regulations are very spoil the investors, so that the expected profit will be obtained. For the people of Indonesia to always maintain security and order, so that investors do not hesitate to invest in Indonesia

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